UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NADIRE ATAS, Plaintiff, - against - THE NEW YORK TIMES COMPANY, *et al.*, Defendants.	:	1:22-cv-00853-JPO *Pro Se* Case

REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF THE NEW YORK TIMES
DEFENDANTS' MOTION TO DISMISS

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The Times defendants ("The Times") respectfully submit this reply memorandum of law in further support of their motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Atas's opposition (the "Opposition") largely repeats the allegations of her complaint without meaningfully addressing the barriers to her claims. She does not dispute, for example, that a court already found she engaged in mass campaigns of defamation and harassment against more than 150 people. Instead, she attempts to dispute specific details about individual victims or argues that she is not estopped from relitigating the findings of Canadian courts. These arguments are unavailing: the publications at issue are substantially true; Atas does not meaningfully address the fair report privilege; she does not point to any legally sufficient evidence of actual malice; and she does not address any of the deficiencies in her claims for vicarious liability. Atas's claims lack any basis in law and should be dismissed with prejudice.

I. THE COURT MAY PROPERLY CONSIDER CANADIAN COURT RECORDS ON A MOTION TO DISMISS

As set out previously, Atas was a party to many civil and criminal proceedings in Canada that are pertinent to—or dispositive of—her claims in this matter. Mem. of Law in Support of Times Defs.' Mot. to Dismiss, ECF No. 58 ("Mot.") 1-6. Atas argues that the Court may not consider those records without converting the motion into one for summary judgment. Pl.'s Opp. to Mot. to Dismiss, ECF No. 72 ("Opp.") ¶¶ 3-4. This is incorrect. On a motion to dismiss, the Court may consider materials incorporated by reference in the Complaint—and Atas's Complaint incorporates many of the relevant records. *See, e.g.,* Third Amended Complaint, ECF No. 43 ("Compl.") ¶¶ 39-42, 60-71 (Caplan Judgment); ¶¶ 51-54, 115, 123-26, 129-32 (criminal record and criminal complaints); ¶ 126 (other judicial records). *See also* Opp. ¶¶ 41, 60-64, 71-72, 76, 79. And it is well-settled that courts may take judicial notice of court records outside the pleadings. Mot. 12. *See, e.g.*, *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 353-54 (S.D.N.Y. 1998)

(collecting cases). This includes foreign judgments. *Lichtenstein v. Cader*, No. 13-cv-2690 (LAK) (JLC), 2013 U.S. Dist. LEXIS 127645, at *6 (S.D.N.Y. Sept. 6, 2013) (collecting cases). Atas also is collaterally estopped from relitigating determinations of fact and law already made in those proceedings. Mot. 13-15. Atas offers no reasoned response to this barrier to her claims. *See* Opp. ¶ 92 (making only the unsupported assertion that she is "not estopped from litigating false and defamatory statements published without privilege to the world about her.").

II. STATE LAW REQUIRES THAT ATAS PLEAD AND PROVE ACTUAL MALICE

Atas argues that she is not required to plead actual malice because she is not a public figure. Opp. ¶ 96. This is incorrect. It is well-settled that New York's anti-SLAPP law, N.Y. Civ. Rights Law § 76-a(d)(2), requires that defamation plaintiffs like Atas who are attacking an article of public interest plead and prove actual malice—regardless of whether they are public figures. *See, e.g.*, *Prince v. Intercept*, No. 21-cv-10075 (LAP), 2022 U.S. Dist. LEXIS 183551, at *35 (S.D.N.Y. Oct. 6, 2022); *Khalil v. Fox Corp.*, No. 21-cv-10248 (LLS), 2022 U.S. Dist. LEXIS 173552, at *23 (S.D.N.Y. Sep. 26, 2022); *Jacob v. Lorenz*, No. 21-cv-6807 (ER), 2022 U.S. Dist. LEXIS 161822, at *19-20 (S.D.N.Y. Sep. 7, 2022); *Margolies v. Rudolph*, No. 21-CV-2447 (SJB), 2022 U.S. Dist. LEXIS 103369, at *23-24 (E.D.N.Y. June 6, 2022) ("[T]he provisions of New York's anti-SLAPP law that expand the categories of claims that must plead actual malice apply in federal court because they do not conflict with any Federal Rule of Civil Procedure.").

III. ATAS HAS NOT AND CANNOT PLAUSIBLY PLEAD ACTUAL MALICE

Atas makes a number of unsupported arguments in an attempt to show actual malice, none of them viable. For example, Atas argues that actual malice is shown because she alleges she provided The Times "with documents prior to publication that showed the falsity of what Kashmir Hill was determined to publish." Opp. ¶ 100. Atas does not identify the documents or

what they related to. Atas also argues she has pleaded that she told The Times "the Babcocks had filed false affidavits," but does not point to any evidence to support the claim they are false. *Id.* ¶ 103. Such denials do not create actual malice. *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977).

Atas also admits that she "did *not* point to any information that would have put The Times on notice of the falsity of the allegations about the tenants," an admission that is fatal to that claim. Opp. ¶ 102 (emphasis added). She claims, without support, that she *could* have provided such information. *Id.* But she does not indicate, even now, what that information is. Given the extensive judicial and factual record supporting the purportedly defamatory statements at issue, Atas cannot plausibly plead actual malice. Mot. 16-18.

IV. POST-PUBLICATION JUDICIAL DECISIONS AND POLICE PROCEEDINGS DO NOT SUPPORT ATAS'S CLAIMS

At various times in the Opposition, Atas attempts to argue that the dismissal of criminal charges against her after publication somehow undermines the Caplan Judgment and exonerates her. *See, e.g.*, Opp. ¶¶ 7-14 57-66, 71, 91. *See also* Compl. ¶¶ 51-54. These arguments are meritless. It is common knowledge that criminal charges may be dropped for a variety of reasons; the exercise of prosecutorial discretion does not alter the prior judicial record. *See, e.g.*, *Anaba v. Cty of Suffolk*, 2013 U.S. Dist. LEXIS 186976, at *16 n.5 (E.D.N.Y. Jan. 15, 2013) (later dismissal of criminal charges is not an exoneration and did not alter previously adjudicated civil findings of wrongdoing). And, in any event, post-publication events are irrelevant to actual malice, which is determined by the defendants' state of mind at the time of publication. *See, e.g.*, *Palin v. N.Y. Times Co.*, 588 F. Supp. 3d 275, 398 (S.D.N.Y. 2022) (post-publication evidence of falsity does not support actual malice, which turns on the author's state of mind at the time of publication).

Atas similarly argues that an August 2021 Canadian judgment found that she did *not* author defamatory posts. Opp. ¶ 76 (citing *Caplan v. Atas*, 2021 O.N.S.C. 5390 (Can.), *available at*: https://tinyurl.com/2r5ztcas ("August 2021 Judgment")). This is incorrect. There, plaintiffs asked the court to amend its prior judgment to make additional findings of defamation, a request the court deemed procedurally improper. August 2021 Judgment ¶¶ 13-14, 23. But the court certainly did not exonerate Atas or find that she did not engage in harassment and defamation after 2019. Indeed, the court reaffirmed that "Atas engage[d] in a years-long campaign of malicious harassment using the internet. No reasonable person could possibly justify the conduct at issue here, as described fully in the [Caplan] Judgment, and as further illustrated in the mass of publications that are the subject-matter of the current motion." *Id.* ¶ 7. And with regard to post-2019 defamatory statements, the Court observed: "Could a reasonable person infer, from all the circumstances, that Atas is the author of the postings that are the subject-matter of the instant order? Of course. As a matter of common sense, such an inference could be drawn." *Id.* ¶ 15. The judgment only reinforces that plaintiff's claims are meritless and should be dismissed.

V. ATAS FAILS TO SHOW THAT ANY OF THE STATEMENTS AT ISSUE ARE ACTIONABLE

The Caplan Judgment determined that Atas engaged in a years-long campaign of harassment against "as many as 150 victims." *See* Mot. 2-3; Declaration of David E. McCraw, dated January 27, 2023, ECF No. 59 ("McCraw Decl.") Ex. A ("Caplan Judgment") ¶¶ 1-7, 140-43. Unable to counter that, Atas instead makes a variety of scattershot arguments about various statements at issue—none of them availing.

A. Matthew Hefler

Atas argues that it is false and defamatory to say she harassed a man named Matthew Hefler. Opp. ¶¶ 15-17. Presumably, Atas focuses on Hefler because the Caplan Judgment did not

identify him by name.[1] But this does nothing to state a claim. Even if Hefler's account were *false*—as Atas claims—The Times's publications would still be substantially true as a matter of law. What Hefler alleged is the same kind of harassment that Atas has been found to have engaged in on a vast scale: she smeared him as a "pedophile" because he happens to be connected to someone she holds a grudge against. *Compare* Opp. ¶ 15 *with* Caplan Judgment ¶¶ 36, 61, 63, 118, 229-31. Whether Atas defamed 150 victims or 149 victims in that way does not give rise to a claim as a matter of law. *See, e.g., Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991) (a statement "is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced."). For the same reason, Atas does not—and cannot—adequately plead actual malice as to reporting on Hefler.

B. Matthew Cameron

Atas argues that it is false and defamatory to say she harassed and defamed Matthew Cameron. Opp. ¶¶ 18-21. To make this argument, Atas misleadingly asserts that in 2015, the Canadian court rejected evidence of her harassment of Cameron. Opp. ¶ 20; Compl. ¶ 98. Her reliance on this early proceeding is entirely misplaced. In 2018, the same court specifically found that:

> Ms Atas pursued a vendetta online against one of the lawyers who acted for Peoples Trust against her, Matthew Cameron. Ms Atas posed as Mr Cameron on the popular internet site "craigslist". In Mr Cameron's name, she sent numerous and explicit messages soliciting sex. Peoples Trust's solicitors obtained the metadata which shows that Ms Atas' internet address was where the posts came from. When Ms Atas was confronted with this information, the posts stopped immediately. I am satisfied on a balance of probabilities that Ms Atas sent these posts, dishonestly, maliciously, and in order to inflict misery upon a young lawyer who had the misfortune of being assigned to work on the Peoples Trust litigation. This was vile, inexcusable behaviour by Ms Atas.

[1] Atas also misrepresents the record with regard to Hefler. Atas asserts he was not involved in "any litigation involving the Plaintiff." Opp. ¶¶ 17, 21. Atas's own Complaint makes clear that Hefler filed a complaint against her and that her posts about him were part of the Caplan Proceedings. *See* Compl. ¶¶ 53, 90.

Peoples Trust Company, 2018 O.N.S.C. 58 (Can.) ¶ 182, *available at*: https://canlii.ca/t/hpj2z. The Times's reporting on Cameron is substantially true based on Canadian court records, it is subject to the fair report privilege, and Atas has not and cannot plausibly plead actual malice.

C. The Babcock Family

Atas asserts that various statements about her campaign of harassment against the Babcock family are actionable. Opp. ¶¶ 23, 42-43, 55. For example, Atas claims it was false to say she harassed the family via letters in the 1990s because the January Article and February Interview reported that the Babcocks felt they were "never able to prove that Ms. Atas is the author of any letters sent in their neighborhood" in the 1990s. Opp. ¶¶ 23, 42-43. Whatever their feelings, however, the Caplan Judgment found that Atas attacked the Babcocks by sending obscene letters to their neighbors in the 1990s. Caplan Judgment ¶¶ 57-59, 77-79. Atas also argues that it was false to say she defamed Guy Babcock in a Wordpress post. Opp. ¶ 31. But the Caplan Judgment found that Atas defamed Babcock by calling him a pedophile and that she often disseminated her harassment via Wordpress. Caplan Judgment ¶¶ 61, 120. She also claims it was actionable to say that she was the Babcock's "nemesis" and "tormentor." But those words are not actionable as statements of fact and, in any event, the Caplan Judgment renders these statements substantially true.

D. Kashmir Hill, Ellen Pollock, and other Times Defendants

Atas argues that Hill, Pollock, and other defendants defamed her by asserting that she smeared them and their relatives online. Opp. 24-25, 29; Compl. ¶¶ 127-28, 132-36. But, as set out previously, these statements are substantially true. *See* Mot. 15. And Atas cannot possibly show actual malice: as the August 2021 Judgment noted, reasonable people can readily infer when Atas is behind online defamation, based on her well-established pattern of conduct.

E. Mental Illness

In multiple Canadian proceedings, Atas has claimed to be mentally ill and courts have found her to be so. Mot. 4, 17-18. Her latest argument—that the defendants made up a quotation from a family member saying she was mentally ill—does not state a claim. Opp. ¶¶ 26-28; 105-06. Atas herself asserts that the defamatory "sting" of the purportedly fabricated quote is that Atas "is mentally ill and will not accept help." *Id.* ¶ 106. That is substantially true.[2]

F. Peace Bond

In her Complaint, Atas alleges it was false and defamatory for The Times to equate a Canadian peace bond to an American restraining order. Compl. ¶ 120. Atas's pleadings and opposition do not explain how the two differ—much less how the analogy rises to the level of defamation. *See id* ¶ 37. The analogy is simply not actionable.

G. Forgery and Firing by the Babcocks

Atas pleads that it was false and defamatory to report that she was fired by the Babcocks after, among other things, forging a homeowner's signature. Compl. ¶¶ 157-58; Opp. ¶ 49. But the Canadian court found that Atas was employed by Babcock's real estate firm, she was "placed on probation . . . for not adhering to professional standards," and she was fired in 1993 for dishonesty after she "forged extensions to a listing agreement." Caplan Judgment ¶¶ 54, 77. The fact that she was not reported to real estate regulators or police does not make those findings false or prevent The Times from relying on the Caplan Judgment as a source. *Id*. ¶¶ 50, 52-53, 104.

[2] Atas also argues, without any reasoning, that it was false to say she was mentally ill. Opp. ¶ 33-34. Those claims fail for the same reasons.

VI. ATAS FAILS TO STATE A CLAIM FOR VICARIOUS LIABILITY

Finally, Atas's claims of negligent supervision and respondeat superior also fail. Mot. 18. Both claims require, as predicate, a showing that an employee committed a tort. The only torts alleged in the Complaint are defamatory statements about Atas. Compl. ¶¶ 253-62. But none of those statements are actionable. In opposition, Atas apparently attempts to amend her claims to say that the relevant tort is a criminal complaint against Atas. Opp. ¶¶ 108-110. Plaintiff may not amend her claims through briefing. *Quirk v. Katz*, No. 20-cv-9910 (LAK), 2022 U.S. Dist. LEXIS 165373, at *20 (S.D.N.Y. Sep. 13, 2022) ("It is 'axiomatic' that a plaintiff cannot amend his complaint through briefing in opposition to a motion to dismiss."). And, even if she could, the claims remain meritless. The only defendant to make a criminal complaint against Atas was Lily Meier, who is not a Times employee. And making a police complaint is not tortious. *Levy v. Grandone*, 789 N.Y.S.2d 291 (2d Dep't 2005).

VII. LEAVE TO AMEND SHOULD NOT BE GRANTED

Atas requests that the Court give her an opportunity to replead. This request should be denied. Atas has already amended her complaint twice. Her opposition does not identify any viable theory of liability. Any opportunity to replead would be futile and would only needlessly multiply these proceedings. *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (request to replead should be denied where repleading would be futile).

CONCLUSION

For all the reasons set forth above, The Times respectfully requests that the Court dismiss the Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) and provide such other and further relief as the Court deems appropriate.

Dated: New York, NY
June 26, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2023, I caused the accompanying papers to be filed via the Court's electronic filing system. Additionally, I caused true and correct copies to be served via U.S. Mail First Class on the following:

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